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IN THE

SUPREME COURT OF THE UNITED STATES

No. 938

JOHN W. PATTNO, ADMINISTRATOR OF THE ESTATE OF GENE A. LEWIS, DECEASED,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John W. Pattno,
Administrator of the Estate of Gene A. Lewis, Deceased, Petitioner,

RONCALIO & GRAVES,
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IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

JOHN W. PATTNO, ADMINISTRATOR OF THE ESTATE OF GENE A. LEWIS, DECEASED,
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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To: THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

JUDGMENT SOUGHT TO BE REVIEWED

Petitioner John W. Pattno, Administrator of the Estate of Gene A. Lewis, deceased, respectfully petitions for Writ of Certiorari to review the judgments against him in the United States District Court for the District of Wyoming, in the United States Court of Appeals for the Tenth Circuit and in the denial by the said Court of Appeals of a petition for rehearing.

The opinion is reported at 311 F.2d 604. A copy of the Circuit Court opinion is appended. No opinion other than findings of fact and conclusions of law was rendered in the District Court, and these findings are set forth in pages 14-17 of the Transcript of Record filed herewith.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the judgment of the United States Court of Appeals for the Tenth Circuit entered November 19, 1962, and of the petition for rehearing which was denied by order entered December 17, 1962.

Jurisdiction to review the judgment and denial of the petition for rehearing is conferred upon this Court by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

a) Did the United States Court of Appeals for the Tenth Circuit err in its decision that the United States is not liable under the Federal Tort Claims Act for a tort committed by a civilian air technician while on a training flight?

b) The United States Court of Appeals for the Tenth Circuit decision implicitly holds that a civilian air technician, held by the Court to be a federal employee, was not acting within the scope of his federal employment even while engaged in the very activity he was employed to perform—does such a decision conflict with the basic Wyoming law of respondeat superior?

c) Does the decision of the Court of Appeals regarding the employment of caretakers in this case conflict with decisions of one or more other courts of appeals on the same question?

d) Did the Court err in deciding that officers of the Wyoming Air National Guard, not in active service, are State rather than Federal employees?

e) Did the Court misunderstand its role in respect to the recognition to be given the Constitution's division of powers between the State and Federal Governments?

f) Did the Court err in deciding that federal law rather than the state law of respondeat superior applies to determine fact of employment?

STATUTES AND REGULATIONS INVOLVED

The statutes involved herein are as follows:

32 U.S.C., § 709(a):

> "(a) Under such regulations as the Secretary of the Army may prescribe funds allotted by him for the Army National Guard may be spent for the compensation of competent persons to care for materiel, armament, and equipment of the Army National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker. Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for materiel, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker."

32 U.S.C. (1939), § 4(a), 48 Stat. 153, 155, § 58, repealed by Act of August 10, 1956, c. 1041, § 2, 70A, Stat. 596.

"The National Guard of each State, Territory, and the District of Columbia shall consist of members of the militia voluntarily enlisted therein who upon original enlistment shall be not less than eighteen nor more than forty-five years of age or who in subsequent enlistment shall be not more than sixty-four years of age, organized, armed, equipped and federally recognized as hereinafter provided, and of commissioned officers and warrant officers who are citizens of the United States between the ages of twenty-one and sixty-four years: *Provided*, That former members of the Regular Army, Navy, or Marine Corps under sixty-four years of age may enlist in said National Guard.

The National Guard of the United States is hereby established. It shall be a reserve component of the Army of the United States and shall consist of those federally recognized National Guard units and organizations, and of the officers, warrant officers, and enlisted members of the National Guard of the several States, Territories and the District of Columbia, who shall have been appointed, enlisted and appointed or enlisted, as the case may be in the National Guard of the United States, as hereinafter provided, and of such other officers and warrant officers as may be appointed therein as provided in section III hereof: *Provided*, That the members of the National Guard of the United States shall not be in the active service of the United States except when ordered thereto in accordance with law, and, in time of peace, they shall be administered, armed, uniformed, equipped and trained in their status as the National Guard of the several States, Territories, and the District of Columbia, as provided in this Act: *And provided further*, That under such regulations as the Secretary of War shall prescribe, noncommissioned officers, first class privates, and enlisted specialists of the National Guard may be appointed in corresponding grades, ratings and branches of the National Guard of the United States without vacating their respective grades and ratings in the National Guard."

28 U.S.C., § 1346 (b):

"Subject to the provisions of Chapter 171 of this title the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands shall have exclusive jurisdiction of civil actions for on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

ANGM 40-01 B.1.

"B. Duties: 1. Interviews rated personnel assigned to the base to determine their level of experience. Flight checks each individual to evaluate the degree of proficiency in particular aircraft. Prescribes and schedules a course of ground and flight instruction for individuals that will develop the aircrew to the degree of proficiency required by current training directives."

STATEMENT OF THE CASE

Gene A. Lewis, the Plaintiff's deceased, was killed as a result of his private airplane being struck by an F-86 jet aircraft owned by the United States and piloted by Capt. William T. Meckem. Immediately before the collision Capt. Meckem was flying in wing position in a two-plane close formation. Lt. Anderson piloted the lead F-86 jet in the formation and was able to avoid colliding with the Lewis aircraft but Meckem's jet was not.

Suit was filed by the Administrator of the deceased. The District Court found the accident was not caused by negligence of an employee of the United States acting within the scope of his employment and further found it had jurisdiction over the case by virtue of 28 U.S.C. 1346 (b).

Lt. Anderson and Capt. Meckem were both officers of the Wyoming Air National Guard. In addition, Capt. Meckem was a flying training instructor employed under the authority of 32 U.S.C. 709 (a). The Court of Appeals held that Capt. Meckem as a flying training instructor was a federal employee. Nevertheless the District Court held the United States not liable under the United States Tort Claims Act because it found that Capt. Meckem was not acting within the scope of his federal employment at the time of the collision.

The United States Court of Appeals also held that in their employment as officers of the Wyoming Air National Guard neither Capt. Meckem nor Lt. Anderson was a federal employee but rather were employees of the State. This finding was made despite a Record showing immense federal control over the Air National Guard and its personnel in the following respects:

1. Total reliance upon federal funds.
2. Reliance on federal equipment loaned to the Guard.
3. Requirement that all personnel be granted federal recognition.
4. Requirement of compliance with federal regulations and directives.
5. Use of federal technician personnel in Guard jobs requiring a fulltime employee.
6. Use of Air Force personnel to coordinate activities.

REASONS AND ARGUMENT FOR ISSUANCE OF WRIT

I. The Decision Creates a Conflict Among the Courts of Appeals on the Question of Caretakers and Their Position As Federal Employees.

Prior to the instant decision every United States Court of Appeals which had considered the issue held the United States liable under the Federal Torts Claims Act, 32 U.S.C., § 1346 (b), for the torts of "caretakers", or technicians employed full time with the National Guard units under the authority of 32 U.S.C., § 709(a), if the tortious conduct occurred within the performance of the duties of the "caretaker" involved. The present decision not only relieves the United States of liability for the negligence of one of its "caretaker" personnel but in addition it establishes a principle which rules out the possibility of the United States ever being held liable for the negligent conduct of any "caretaker" under any set of circumstances. Hence, this decision conflicts with not only the decisions of other circuits, but indeed with a prior decision of the Tenth Circuit.

A "caretaker" is an individual whose employment is derived from 32 U.S.C., § 709(a). In *United States* v. *Holly*, 192 F.2d 221 (C.A. 10), the Tenth Circuit held that such an individual was a "federal employee" and since it was admitted he was performing "caretaker" duties at the time of the negligent act, the Court held the United States liable under the Federal Tort Claims Act. This case was followed by every Court of Appeals which considered the question, *United States* v. *Wendt*, 242 F.2d 854; *Courtney* v. *United States*, 230 F.2d 112; *Elmo* v. *United States*, 197 F.2d 230; *United States* v. *Duncan*, 197 F.2d 233; and *Watt* v. *United States*, 123 F. Supp. 906 and most recently *State of Maryland* v. *United States*, 200 F. Supp. 475 (1961).

In the instant case the Court purported to again follow *United States* v. *Holly*, even going so far as to find Capt. Mechem a federal employee on the authority of that case. However, the reasons given by the Court in holding that Capt. Meckem was not acting in the scope of this federal employment reveal that the Court has developed a principle which invariably will immunize the United States from liability for negligent acts of caretakers.

The Court found Capt. Meckem not acting within the scope of his federal employment even though (1) the Court also found that at the time of the crucial flight Meckem was evaluating the flying proficiency of Anderson and (2) the Federal regulation, quoted above, provides that one of the duties of a flying training instructor shall be to "(f)light check each individual to evaluate the degree of proficiency in particular aircraft". The Court's reasons for holding that Capt. Meckem was not acting in the scope of his federal employment were: 1) "Wyoming had control over Capt. Meckem for crucial flight" and 2) the business of this training flight was Wyoming's, since training is "a function which both the Federal Constitution and Statutes place on Wyoming." (See opinion, Appendix A). On the basis of these criteria, a "caretaker" could NEVER be said to be acting in the scope of his federal employment. The Court's finding of state "control" was based on certain facts common to *all* "caretakers"—*e. g.*, the manner in which they are employed, assigned, promoted, demoted, and paid and the fact that in a very technical sense authority over them resides in the state adjutant general. The Court's finding that Capt. Meckem was on the business of the state, because the flight was concerned with training also would be equally applicable to all "caretakers". For example even the traditional type "caretaker"—*i. e.*, an individual charged with the care

and custody of federal equipment—is directly involved with equipping the National Guard, a function which is just as much a state function as is training.

Therefore, the instant case is, from a realistic point of view, just as much at conflict with existing "caretaker" decisions as if it had expressly overruled or refused to follow them.

II. The Conflict Between the "Caretaker" Cases and the "National Guard" Cases Is Based on an Unreal Distinction Which Creates Confusion on an Important Question of Federal Law Which Has Not Been but Should Be Settled by This Court.

The Federal Courts have held, with a single exception, *O'Toole* v. *United States,* 206 F.2d 912 (1953), that members of national guard units are state employees, *Williams* v. *United States,* 189 F.2d 607; *Dover* v. *United States,* 192 F.2d 431; *Mackay* v. *United States,* 88 F. Supp. 696; *Satcher* v. *United States,* 101 F. Supp. 919; and *Larkin* v. *United States,* 118 F. Supp. 435. Conversely the Courts have held without exception, that "caretakers" are federal employees. The criteria for the holdings in the "caretaker" cases is the degree of control which the federal government exercises over them. On the other hand, the criteria for the holdings in the "national guard" cases is a Court interpretation of the language of the United States Statute, 32 U.S.C.A., Sec. 4(a) (since repealed), regarding the status of the National Guard and the duties of the states concerning it. Although these questions are very similar, the rationales used in determining them are in direct opposition to each other. Without regard to the result, the test for determining whether "caretakers" and national guardsmen are federal or state employees should be the same. Furthermore, the determination should be made

by a comparison of the actual relationship and control existing between "caretakers" and the federal government on the one hand, and the guardsmen and the federal government on the other hand.

In the instant case the Court decided the question of employment on the basis of the traditional application of federal statutes and constitutional provisions. This application we feel was incorrect both in this case and in all of the "national guard" cases. As a result there is an unjustified split in the authority of the "caretaker" cases as opposed to the "national guard" cases which can only be settled by review of this Court.

Control is the very essence of the employer-employee relationship. American Law Institute, *Restatement of the Law, Agency* 2d, Section 1. It is firmly established that statements as to control contained in a contract between an alleged principal and his agent are not binding on the Courts when it comes to determining the relationship between the parties, and we submit that neither are the contents of the constitution, statutes or regulations.

If the Court were to consider the facts of control as they actually exist, it is very probable that the employer of "caretakers" and of guardsmen would be found to be one and the same—*i. e.*, the federal government. See the dissenting opinion in *Courtney* v. *United States*, (2d Cir.) 230 F.2d 112, 114, where the lack of any real substance to the different treatment in the two types of cases was clearly recognized.

The development of these two rationales for determining the same basic fact has given rise to an unrealistic situation wherein a man may on two successive days be working for the same superior, at the same location, flying the same airplane, receiving the same pay check, drawn

on the same account, wearing the same uniform and performing the same duties under the same regulations and directives but nevertheless on one day he is an employee of the state and on the next an employee of the federal government.

The lower courts when dealing with the national guard situation have failed to reach agreement on the status of caretakers and national guardsmen, as to when they impose liability on the federal government for their negligent acts, under the provisions of the United States Torts Claims Act, 28 U.S.C. 1346(b). The opinion in the instant case we feel bears out that inconsistency by its ponderous efforts to tread a narrow line between the guardsmen and caretaker authorities.

This Court will never have a better opportunity to consider all aspects of this complex field nor a better vehicle by which to resolve them, than is found in the instant case.

III. The Court of Appeals Erroneously Viewed the United States Constitution As Limiting the Court's Power to Determine Facts As They Actually Are.

The Court stated: "An interpretation of the record before us to permit the conclusion that either flying instructor Meckem or trainee Anderson was an employee of the United States would so weaken the pertinent constitutional provision as to once more corrupt the distinctions, clearly set forth therein, between the powers and duties of the two governments." (See opinion, Appendix A). Implicit in this statement is the Court's impression, that a conclusion that either Capt. Meckem or Lt. Anderson was a federal employee would amount to placing its stamp of approval on federal activity which to the Court, was inconsistent with the constitutional pronouncement as to the division of powers between state and federal government.

If the federal government in its relation with "caretakers" and guardsmen has intruded into an area of state concern, then, in its desire to uphold the Constitution, the Court could have done no better than to recognize the supposed intrusion for what it is. Ignoring the problem does not solve it.

The Court of Appeals, by the foregoing statement has established a rule of law which if applied in other cases could drastically change a basic concept of law. That basic concept is that courts must apply the Constitution or a statute to the facts, rather than revise facts to fit the Constitution or statute. This case must be reviewed by this Court to rectify this error.

IV. The Court of Appeals Decided an Important State Question in a Manner Inconsistent with State Law in Failing to Properly Apply Wyoming Law on the Issue of Scope of Employment.

The Court recognized in its opinion that the "Supreme Court has said in *Williams* v. *United States*, 350 U.S. 857, 76 S. Ct. 100, 100 L. Ed. 761, that the law of the place of the accident controls the doctrine of respondeat superior". (See opinion, Appendix A). Yet the Court's decision directly conflicts with Wyoming law on this point. Without first indulging in any detailed discussion of Wyoming law, Petitioner feels confident in stating that it is *not* the law of Wyoming that an employer is not bound on principles of respondeat superior by a tort of his employee committed while the employee was doing precisely what he was employed to do. See *Blessing* v. *Pittman*, 70 Wyo. 416, 251 P.2d 243; *Stockwell* v. *Morris*, 46 Wyo. 7, 22 P.2d 189 (1933).

Petitioner submits that on this point alone the decision is subject to review for two of the reasons set forth

in this Court's Rule 19—: (1) an important state question was decided in a way in conflict with applicable state law and (2) a federal question (*i. e.*, the proper choice-of-law rule) was decided in a way in conflict with applicable decisions of this Court, are clearly presented by the opinion and open the doors to invite review.

V. The Court of Appeals Decided an Important Question of Federal Law Which Has Not Been but Should Be Decided by This Court in Failing to Apply State Law in Determining Whether Lt. Anderson and Capt. Meckem, As National Guardsmen, Were Federal or State Employees.

In determining the fact of employment the federal courts have relied on constitutional and statutory provisions to the effect that national guardsmen are to be state employes. In making this same determination, Wyoming law looks to the actual facts surrounding the relationship, including the fact of control. Had the Court correctly followed Wyoming law, its decision would have been that both Lt. Anderson and Capt. Meckem were federal employees. Instead, the Court applied Federal law, on the authority of *Courtney* v. *United States*, 2 Cir., 230 F.2d 112.

In *Williams* v. *United States*, 350 U.S. 857, it was held that the local law of respondeat superior should be applied in determining whether an employee was acting within the scope of his employment. *Hopson* v. *United States*, D.C., W.D. Arkansas, 136 F. Supp. 804, 812, held on this authority that local law should also be applied in determining fact of employment.

Inasmuch as a question has arisen as to the exact limit of the *Williams* rule, the question can be put to rest only by this Court.

CONCLUSION.

All of the traditional reasons for review of a Court of Appeals decision on Certiorari are presented by this case. The decision creates a conflict among the circuits, it passes on an extremely important question of federal law concerning which there is much unnecessary confusion and inconsistency, it conflicts with applicable state law and with a decision of this Court, it raises a question concerning the precise limits of a rule announced by this Court, and it evidences a basic misconception of the role of a federal court with regard to a recurring question of constitutional law.

Wherefore your Petitioner respectfully requests that a Writ of Certiorari issue to the Court of Appeals for the Tenth Circuit to the end that the many questions presented by the unfortunate opinion below may be resolved and corrected by this Court.

Respectfully submitted,

John W. Pattno,
Administrator of the Estate of Gene A. Lewis, Deceased, Petitioner,

RONCALIO & GRAVES,

By: .....
CHARLES E. GRAVES,

.....
WILLIAM E. SHADE,
His Attorneys.

APPENDIX A

United States Court of Appeals

TENTH CIRCUIT.

No. 6899.

JOHN W. PATTNO, Administrator of the Estate of Gene A. Lewis, deceased,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BREITENSTEIN, CIRCUIT JUDGE.

A mid-air collision between a Wyoming Air National Guard F-86 jet airplane and a private plane resulted in the death of Lewis, the pilot of the private plane. The appellant-plaintiff, as administrator of the estate of Lewis, sued the United States under the Federal Tort Claims Act. The trial court denied recovery on the ground that the accident was not caused by the negligence of an employee of the United States while acting within the scope of his employment.

Captain Meckem and Lieutenant Anderson, both officers of the Wyoming Air National Guard, were on a training flight in which Meckem was evaluating the flying proficiency of Anderson. The flight was not under the command responsibility of the United States Air Force but was authorized by the Operations Section of the Wyoming

Air National Guard. Prior to the collision, Meckem was flying the No. 2 position in a close formation, the lead plane of which was piloted by Anderson. Anderson saw the private plane in time to take evasive action but Meckem, whose vision was obstructed by Anderson's plane, hit the private plane on the side at a 70-degree angle. Meckem parachuted to safety and received superficial injuries.

The Federal Tort Claims Act[1] imposes liability on the United States for death caused by the negligent act of a Federal employee while acting within the scope of his employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Before reaching the issue of negligence we must determine whether either Meckem or Anderson was an employee of the United States and, if so, whether the accident occurred within the scope of such Federal employment. In examining these issues we must decide if state or Federal law controls.

The Supreme Court has said in *Williams* v. *United States*, 350 U.S. 857, that the law of the place of the accident controls the doctrine of respondeat superior. Following this decision, the Tenth Circuit held in *United States* v. *Mraz*, 10 Cir., 255 F.2d 115, 116, that state law governs in determination of scope of employment.

The fact of employment is in a different category. The States may not decide for the United States who are and who are not Federal employees because the existence of Federal employment is a Federal question to be answered by application of Federal law.[2] In the case at bar both

1. 28 U.S.C., §§ 1346(b), 2401(b), 2671-2680.

2. *Courtney* v. *United States*, 2 Cir., 230 F.2d 112, 114, 57 A.L.R. 2d 1444; *contra*, *Hopson* v. *United States*, D.C. W.D. Ark., 136 F. Supp. 804, 812.

the Federal Constitution and statutes bear on the fact of employment. The supremacy of Federal law requires the determination of Federal employment by Federal law.

Art. I, §8, cl. 16, of the United States Constitution reserves to the States:

> "* * * Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *."

Under this constitutional provision and the implementing statutes, Air National Guard officers are appointed by the State[3] and the training of the National Guard is effected by the State.[4] As officers of the Wyoming Air National Guard, not in active Federal service, Meckem and Anderson were State, rather than Federal employees,[5] and this status is not changed by the fact that they were paid by the United States,[6] or the fact that at the time of the accident they were flying planes owned by the United States and loaned to the Wyoming Air National Guard.[7]

We must give further consideration to Meckem because he was both a National Guard officer and a civilian flying training instructor, sometimes referred to as an air technician. The basic authority for his status as such comes from the so-called "caretaker" statute.[8]

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3. 32 U.S.C., § 101(6)(B); 10 U.S.C., § 8379.

4. 32 U.S.C., § 501(b).

5. *Williams* v. *United States*, 10 Cir., 189 F.2d 607, 608.

6. *Cromelin* v. *United States*, 5 Cir., 177 F.2d 275, 277, certiorari denied 339 U.S. 944.

7. *Pearl* v. *United States*, 10 Cir., 230 F.2d 243, 247.

8. 32 U.S.C., § 709, which in material portion provides:

> "(a) Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of

Recent appropriation bills have authorized the use of funds appropriated under this statute not only for payment to persons entrusted with the care of property owned by the Air National Guard but also to air technicians who render necessary services.[9] As an air technician or flying training instructor, Meckem was appointed under Air National Guard Regulation 40-02 which relates to "Civilian Personnel" and which provides in its Paragraph 2 that:

> "Air National Guard civilian personnel are considered to be employees of the State, * * * (21 Comptroller General Decision 305)."

Paragraph 7b(3)(a) of the Regulation places upon the State the responsibility to "employ, assign, promote, demote, and separate Air National Guard civilian personnel." The statute[10] empowers the Secretary of the Air Force to fix the pay of caretakers and to "designate the person to employ them." This authority was delegated to the States and in Wyoming was lodged in the Adjutant General. Meckem was employed as a flying training instructor by the Base Detachment Commander of the Wyoming Air National Guard under authority delegated by the State Adjutant General.

United States v. *Holly*, 10 Cir., 192 F.2d 221, and several cases following it,[11] hold that one employed under

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competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker."

9. Pub. L. 85-117, Aug. 2, 1957, title V, 71 Stat. 322; Pub. L. 84-639, Act of July 2, 1956, ch. 438, title V, 70 Stat. 466.

10. 32 U.S.C., § 709(f).

11. *United States* v. *Wendt*, 9 Cir., 242 F.2d 854; *Courtney* v. *United States*, *supra*, note 2; *Elmo* v. *United States*, 5 Cir., 197

the caretaker statute is an employee of the United States. Thus, Meckem had two masters. As a commissioned officer in the Wyoming Air National Guard he was an employee of Wyoming. As a flying training instructor or air technician or caretaker, he was an employee of the United States. The inquiry narrows to the question of the particular employment in which he was engaged at the time of the accident.

Meckem was on a flight authorized, commanded, and controlled by the Wyoming Air National Guard and not by the United States or any agency thereof. The purpose of the flight was to evaluate the flying skill of Anderson. An evaluation flight is part of a training program because without evaluation the sufficiency and adequacy of the training cannot be determined. To say that the educational process ends just before the final examination is to disregard realities.

Scope of employment, as distinguished from fact of employment, is determined by state law. *Blessing* v. *Pittman*, 70 Wyo. 416, 251 P.2d 243,[12] lays down two tests for the application of the doctrine of respondeat superior. These are (1) who had control over the servant and (2) in whose business was the servant engaged at the time of the accident. Wyoming had control over Meckem for the crucial flight, as has been shown, and the business of the flight was the training of a Guard member, a function

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F.2d 230; *United States* v. *Duncan*, 5 Cir., 197 F.2d 233; *State of Maryland* v. *United States*, D.C. W.D. Pa., 200 F. Supp. 475; Cf. *Watt* v. *United States*, D.C. E.D. Ark., 123 F. Supp. 906.

12. See also *Fox Park Timber Co.* v. *Baker*, 53 Wyo. 467, 84 P.2d 736, and *Stockwell* v. *Morris*, 46 Wyo. 1, 22 P.2d 189. The Tenth Circuit followed the rule stated by *Blessing* v. *Pittman* in *Leonard* v. *United States*, 10 Cir., 235 F.2d 330, certiorari granted and case remanded 352 U.S. 996.

which both the Federal Constitution and statutes place on Wyoming.

Appellant urges that the increase in Federal interest in National Guard activities, the comprehensive regulation of National Guard members by reason of the need for Federal recognition to obtain Federal funds, and the possible activation of units and individuals lessens the impact of traditional reasoning that the training of National Guard units is under the control of the States by reason of the mentioned constitutional and statutory provisions.[13] Support for this argument comes from congressional recognition that national defense places a heavy responsibility on the National Guard and that the use of contemporary war machines has increased the danger to persons and property within training areas. While legislative history indicates that all legislation regarding the National Guard has been enacted with the intent and understanding that the Guard was primarily the responsibility of the States until called into active duty,[14] Congress has amended Title 32 to provide a limited administrative adjustment and settlement of claims arising by reason of torts committed by National Guard personnel.[15]

This recognition of moral obligation for torts of those acting under dual Federal and State authority does not invite the conclusion that all National Guardsmen are in the service of the United States for the purposes of suit under the Federal Tort Claims Act. While the interest of the United States is served by the existence of trained reserve forces, that interest is shared by each of the States

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13. See *United States ex rel. Gillett* v. *Dera*, D.C. Cir., 74 F.2d 485, 487.

14. 2 U.S. Cong. & Adm. News '60, p 3492.

15. 32 U.S.C., § 715.

and the Constitution specifically commits the responsibility of training the National Guard to them.

The facts that Meckem was controlled by the State and on the business of the State distinguish this case from *United States* v. *Holly, supra,* because they establish that under Wyoming law respondeat superior does not operate to impose liability on the United States. In Holly, the Government agreed that the accident occurred within the scope of employment and the only question was the identity of the employer.

An interpretation of the record before us to permit the conclusion that either flying instructor Meckem or trainee Anderson was an employee of the United States would so weaken the pertinent constitutional provision as to once more corrupt the distinctions, clearly set forth therein, between the powers and duties of the two governments. The decision that neither Meckem nor Anderson, at the time of the accident, was acting as an employee of the United States disposes of the case and does away with any need to discuss the question of negligence.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 938

JOHN W. PATTNO, ADMINISTRATOR OF THE ESTATE OF GENE A. LEWIS, DECEASED, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court are not reported. The opinion of the Court of Appeals for the Tenth Circuit (Pet. A 1–7) is reported at 311 F. 2d 604.

JURISDICTION

Judgment of the court of appeals was entered on November 19, 1962. A petition for rehearing was denied on December 17, 1962. The petition for a writ of certiorari was filed on March 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly interpreted and applied the Wyoming law of *respondeat superior* in refusing to hold the United States liable under the Federal Tort Claims Act for the acts of a civilian air technician while conducting a training flight under the authority, command and control of the Air National Guard of the State of Wyoming.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article I, Section 8, of the Constitution of the United States provides:

> The Congress shall have Power * * *
>
> * * * * * *
>
> [Clause 16]
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
>
> * * * * * *

Title 32, United States Code, Section 101(6) provides in pertinent part:

> (6) "Air National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—
>
> * * * * * *

(B) is trained, and has its officers appointed under the sixteenth clause of section 8, article I, of the Constitution;

* * * * *

Title 32, United States Code, Section 501(b) provides:

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

Title 32, United States Code, Section 709(a) provides:

(a) * * * Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker.

Title 10, United States Code, Section 8379 provides:

Notwithstanding any other provision of this chapter, the appointment of commissioned officers of the Air National Guard is a function of the governor or other appropriate authority of the jurisdiction concerned.

Air National Guard Regulation 40-02 provides in part:

2. *Scope and Status.* * * * Air National Guard civilian personnel are considered to be

employees of the State, Territory, Puerto Rico, or the District of Columbia, as appropriate. (21 Comptroller General Decision 305).

* * * * *

7. *Responsibilities:*

* * * * *

b. The adjutant general of each State, Territory, Puerto Rico, and the District of Columbia has responsibility for the administration of the civilian personnel program of Air National Guard bases and stations under his jurisdiction. This responsibility will normally be exercised through State Air National Guard staff and allied agencies associated with administrative, technical, and advisory services for the State Air National Guard. The specific responsibilities include:

* * * * *

(3) Administering the local civilian personnel program. To accomplish this the adjutant general is authorized and encouraged to delegate the following administrative functions to the base detachment commander or senior air technician of the separate base or station.

(a) To employ, assign, promote, demote, and separate Air National Guard civilian personnel.

* * * * *

STATEMENT

Petitioner instituted this suit under the Federal Tort Claims Act against the United States in the District Court for the District of Wyoming, seeking to recover damages for the wrongful death of Gene A. Lewis, who, while piloting a private airplane, was killed in a mid-air collision with a jet plane piloted

by Captain William Meckem of the Wyoming National Guard. On December 15, 1959, the day of the accident, Lieutenant Howard T. Anderson was an officer in the Air National Guard of Wyoming, appointed by the Adjutant General of Wyoming by command of the Governor, and assigned by the same command to the 187th Fighter Interceptor Squadron. As a squadron pilot he was required to submit to periodic evaluation of his proficiency. Similarly, Captain William E. Meckem was appointed an officer in the Wyoming National Guard, and was a pilot and flight leader in the same squadron. He, too, was appointed, by command of the Governor, a civilian Flying Training Instructor in the Wyoming Guard, and as such was known as an air technician. The basic authority for his status as a civilian flight training instructor is the so-called "caretaker" statute, 32 U.S.C. 709 (*supra*, p. 3).[1]

At the time of the accident, Captain Meckem was on a flight to evaluate Lieutenant Anderson's pro-

[1] Air technicians are appointed under Air National Guard Regulation 40-02, and are paid with federal funds appropriated for the National Guard. Responsibility for the administration of the civilian air program of the Air National Guard is in the various states. In Wyoming, this responsibility is lodged with the State Adjutant General. He has the authority to employ, assign, promote and separate air technicians; to prescribe rates of pay based upon a required number of duty hours; and to establish duty hours. Captain Meckem was hired as an air technician by the Base Detachment Commander of the Wyoming Air National Guard under authority delegated by the State Adjutant General (Pet. A 4). And as a flying training instructor his duties pertained entirely to flying instruction, and in nowise to the care of property. Air National Guard Manual 40-01 B. 1 (Pet. 5).

ficiency as a fighter pilot (Pet. A 1). Neither officer was in the active military service of the United States at that time, and, as the court below noted, the flight was "autlforized, commanded, and controlled by the Wyoming Air National Guard and not by the United States or any agency thereof" (Pet. A 5). While Captain Meckem was flying the No. 2 position, in close formation as wingman slightly below and to the right of Lieutenant Anderson's lead plane, a private aircraft, owned and operated by Mr. Lewis, suddenly appeared in front of the formation. Lieutenant Anderson saw the private plane in time to take evasive action, but Meckem, whose vision was obstructed by Anderson's plane, collided with the private plane (Pet. A 2).

The trial court found that it was physically impossible for Captain Meckem to see the approach of the Lewis aircraft in sufficient time to avoid the collision because of the position of his aircraft in relation to the lead aircraft; that his chief duties as wingman were those of keeping his aircraft in close proximity to the lead aircraft (R. 16); that both Lieutenant Anderson and Captain Meckem operated their aircraft in a reasonable and careful manner in all respects; and that they were not negligent in the operation of their aircraft (R. 17). The district court further found that Lieutenant Anderson and Captain Meckem, at the time of the accident, were acting under the exclusive control and direction of the State of Wyoming, not the United States. Accordingly, it entered judgment for the government (R. 17).

The court of appeals affirmed. It held that the "fact of employment" was governed by federal law; that in light of the constitutional[2] and statutory[3] provisions assigning to the States responsibility for the appointment and training of National Guard officers, both Lieutenant Anderson and Captain Meckem, as officers in the Wyoming Air National Guard not in active federal service, were state, rather than federal, employees (Pet. A 3); but that Captain Meckem, in his capacity as air technician, appointed under the "caretaker" statute, was an employee of the United States.[4] It further held, however, that at the time of the collision Captain Meckem was acting under the control and in the business of the Wyoming Air National Guard, and therefore—under the Wyoming law of *respondeat superior*, which governed the issue of "scope of employment"—the United States was not liable for his alleged tort (Pet. A 5–A 6). *Williams* v. *United States*, 350 U.S. 857; *Richards* v. *United States*, 369 U.S. 1, affirming 285 F. 2d 521 (C.A. 10).

ARGUMENT

Petitioner's contention is, in effect, that the concurrent decisions below misapply the Wyoming law of *respondeat superior* (Pet. 12–13). This contention is groundless. Moreover, the decision below is not in conflict with any other appellate decision. Finally,

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[2] Art. I, Sec. 8, Cl. 16.

[3] 32 U.S.C. 101(6)B and 501(b); 10 U.S.C. 8379.

[4] We take the position, as we did below, that persons hired pursuant to the "caretaker" statute (32 U.S.C. 709) are employees of the states, and are not employees of the United States.

as we show *infra*, there is an independent ground sustaining the correctness of this decision. Consequently, review by this Court is unwarranted.

1. Under the Federal Tort Claims Act, 28 U.S.C. 1346(b), the United States is liable for the tortious conduct of "any employee of the Government while acting within the scope of his * * * employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The fact that the tortfeasor is, as a matter of federal law, an employee of the United States does not preclude him from also being a state employee; nor does it settle whether he was acting within the scope of his *federal* employment at the time of the tort. That question—the "scope of employment" question, and, consequently, whether vicarious liability would be imposed upon a private employer similarly situated—is a matter governed by the *respondeat superior* law of the State where the tort was committed—here Wyoming. *Williams* v. *United States*, 350 U.S. 857; *Richards* v. *United States*, 369 U.S. 1, affirming 285 F. 2d 521 (C.A. 10). Thus, having concluded that Captain Meckem was an employee of the United States, the court of appeals properly turned to Wyoming law to determine whether he was acting within the scope of his federal employment at the time of the collision or whether, instead, he was acting as an employee of the State. It noted that the leading Wyoming case of *Blessing* v. *Pittman*, 70 Wyo. 416, 251 P. 2d 243, established two criteria for determining vicarious lia-

bility in such "dual master" situations: (a) who exercised control over the servant and (b) in whose business was the servant engaged at the time of the accident.[5] Here, the crucial flight was authorized, commanded, and controlled by the Wyoming Air National Guard, and not by the United States or any of its agencies. And it was undertaken as part of a program to train Guard members—a task which the Constitution, as well as federal statutes, assign to the States. Thus, the court of appeals, applying the tests laid down in *Blessing* and other Wyoming cases cited in the opinion, was correct in concluding that liability for Meckem's alleged negligence rested exclusively in the State of Wyoming, not the United States (Pet. A 5–A 6). Both courts below have considerable experience in dealing with questions of Wyoming law, and, under familiar principles, their disposition of such a question should not be disturbed. See *Propper* v. *Clark*, 337 U.S. 472, 486–487; *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707–708.

2. The decision below is not, as petitioner urges, in conflict with other "caretaker" cases—such as the Tenth Circuit's own decision in *United States* v. *Holly*, 192 F. 2d 221, and the several cases which

[5] These tests are also determinative, we believe, in measuring *respondeat superior* liability under Maryland law. For that reason, we have taken appeals from adverse district court decisions in litigation involving the Maryland Air National Guard arising out of the *Brunswick* accident. Those appeals are now pending in the Court of Appeals for the District of Columbia Circuit, *sub nom. State of Maryland for the use of Meyer* v. *United States*, Nos. 16,953, 16,954 and 16,955, and in the Court of Appeals for the Third Circuit, *sub nom. State of Maryland for the use of Levin* v. *United States*, Nos. 14,041 and 14,042.

followed it.[6] In each of those cases—unlike the present case—the *sole* issue in controversy was whether the negligent caretaker was an employee of the United States. Neither in *Holly*, nor any of its successors, was the "scope of employment" issue expressly raised or considered. In none of the cases did the government contend, as it does here, that the caretaker was acting under the control of the State at the time of the accident, so that under the applicable state law of *respondeat superior* the United States, even though assumed to be the "general employer," would still not be vicariously liable.

3. The decision below can be sustained on an independent ground. The district court found, apart from any question of employment or *respondeat superior*, that, on the facts, both Anderson and Meckem operated their aircraft "in a reasonable and careful manner in all respects" and were not negligent (R. 16). The record fully substantiates this factual determination (R. 64–65, 76–77, 91). Thus, if the court of appeals had reached this question, it would undoubtedly have concluded that the finding of no negligence was supported by the record and not "clearly erroneous" under Rule 52(a), F.R.C.P. Significantly, the court of appeals, though noting that there was no need to discuss the question of negligence, expressly noted that Meckem collided with the private plane because his vision was ob-

[6] *United States* v. *Wendt*, 242 F. 2d 854 (C.A. 9); *Courtney* v. *United States*, 230 F. 2d 112 (C.A. 2); *Elmo* v. *United States*, 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan*, 197 F. 2d 233 (C.A. 5).

structed by the lead plane and that, unlike Anderson, he did not see it in time to take evasive action (Pet. A 2). In sum, even if it be assumed *arguendo* that the alleged tortfeasors' conduct could be imputed to the United States, judgment was still properly entered for the government because there was no actionable negligence.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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